

## THEORY OF CONSTITUTIONAL LAW

Outline, Second Eight Weeks of First Semester, 1952-53

C 29312

## I. Reasons for Studying the Basic Views of Reality Underlying Western and Chinese Societies.

(1) Political institutions are not ends in themselves. They are instruments that a society uses to aid in planning and administering its efforts to meet the needs and satisfy the impulses and aspirations of its members and to protect that effort from frustration or undue interference. Political institutions are used to govern, or aid in governing, the common effort.

(2) Consequently the successful functioning of political institutions depends upon a concord beyond the institutions themselves. If there is general agreement among a people about the ends to be achieved by common action, then even awkward, inefficient political institutions will play a helpful part in achieving those ends. But if there is no such general agreement even technically perfect political institutions will not be effective because different persons will be seeking to use the institutions to achieve differing and conflicting ends.

(3) Furthermore, limitation of the power of political institutions is impossible without an underlying concord. Limitation of political institutions means distributing governing power between the formal institutions of "government" and the individual citizens. Therefore, a constitution, which limits the power of government, at the same time defines the freedoms of the individual citizens to think and act on their own initiative and in their own interests. However, the independently initiated actions of individuals must fit in with and further the common effort of the society as a whole. Otherwise the coordination of actions, the cooperation, that has made a society out of that group of persons will be destroyed and that society will begin to disintegrate.

(4) When concord is lost there are three alternatives:

(A) Control of the political institutions by a few persons and imposition of their decisions upon the rest of the members of the society. This avoids, at least for a time, the disintegration of the society, but it wipes out personal freedom. Such an authoritarian government will be especially vulnerable to instances of individuals in positions of authority acting in their own interest rather than in the common interest because there is no prevailing common purpose above personal interests and opinions to be dedicated to. Memory of past unity is not enough. It must be remembered, however, that so long as there is no concord--no common faith--to harmonize the decisions of individuals the alternative to such a centralized, authoritarian government is not a limited government which would allow personal freedom. Without concord the only alternative is

(B) Political disintegration, splintering of political institutions among factions which are able to control a certain group of persons through doctrine, personal ties, physical or economic coercion, or combinations of these. For China this would mean a return to the warlords.

(C) The third alternative is to develop a new concord, a new common faith. This is a painful business requiring a great amount of fundamental thinking and the emotional ordeal of giving up old habits and ways of thought and building new. It is, however, the only true solution, and it is on the basis of this alternative that we proceed in this class.

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(5) A revolution that overthrows a government--that is, a regime--does not necessarily undermine the concord necessary to the successful functioning of the political institutions of the society. A revolution that casts out a form of government by that act brings into question the old basis of concord.

(6) This latter is true because the basis for concord is the beliefs that are so far unquestioned that they are taken by a people as reality itself. This view of reality includes what that people hold to be true about the nature of man, what his needs, impulses and aspirations are, and what the nature of the universe is, the environment in which man must act to meet their needs and satisfy their impulses and aspirations. Such a view of reality is then the criterion for deciding basic social, economic and political questions--questions about what should be the relations between men with respect to their natural resources and with respect to their own persons.

(7) Thus, the normative or value questions in a society, i.e. what is "good" or "bad," what ought to be done, or ought not be done in political, economic or social situations, are not ultimate questions and can not be answered by a study of political, or economic, or social facts. Such studies would tell what particular men do or have done. It would be factual and would furnish no normative guidance. But the purpose of law, for instance, is to require actions that otherwise would not be taken. Therefore, these normative questions are answered not in accordance with what particular men do, but on the basis of prevailing beliefs as to what man, as man, is, and of the implications from that conception as to what particular men should do in various relationships with one another--political, economic, and social--in order to act in accordance with their true natures. Economic and social theory, and political theory, such as the form of government that is "good," or "just," are all derived from a view of reality. A people's social, economic, and political goals, and the institutions for realizing those goals are all selected on the basis of that people's view of reality.

(8) A revolution that casts out a form of government, therefore, calls into question the basis of concord in that society because it rejects the previously accepted political implications of that people's view of reality. It might be possible to institute a form of government different from the old but still compatible with the old view of reality. If this were done concord would not be lost, but would sustain and make effective the new political institutions. The course that was followed in China, however, was to import, or borrow, political institutions that had worked well for European peoples.

(9) In order to understand those borrowed political institutions it is not enough to know political facts. Because political fact get their color and life from the underlying concord. One must also know the view of reality that led the European peoples to build their particular political institutions.

(10) When we know the views of reality underlying the borrowed political institutions in the societies where they were developed and then we compare those views with the view of reality underlying traditional Chinese society, then we will know whether we can expect to find in Chinese society the concord that will make the borrowed political institutions function effectively.

(11) If we do not find a great enough similarity of the views of reality underlying Chinese and European societies so that we can expect the necessary support in China for European, borrowed, political institutions, then we will know the roots of the difference and the measure of the task of completing the revolution. For, previous political goals and institutions having been rejected, new goals and institutions must be put in their place. But the new political branches must be able to draw life and sustenance from the old roots, or else new roots must be developed.

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## II. Basic Assumptions about Reality in Western Civilization and in Chinese Civilization

### (A) Preliminary Stages of Scientific Thought:

Question or Problem	Greek Foundations of Western Civilization	China
What is the Source of the animation and order observed to be present in the Sensed world?	The animating and ordering principle or force is possessed by certain forceful, resourceful men. (The societies of families and tribes and of the city-states in Greece and early Rome were organized on the basis of this view of reality. Best picture of these societies is in Fustel de Coulanges' "Ancient City.")	The source is certain occasions when and sites where the sensed social solidarity or oneness of <u>jen</u> is experienced (Fetes, hierogamies, jousts, etc.) The structure of early Chinese society is not clear at the present time.
What is the Nature of the animation and order and of that which is animated and ordered.	(1) The Real is Stuff (material) (Another school of Greek thought held that the Real is Number)	The Real is Social
Is it one or many?	a sensed one	a sensed one
Divided or Undivided?	Divided This answer is required by the anthropomorphic interpretation of the source.	Undivided Because of this answer, possible since the most vital, ultimate features of observed reality are not divided among certain men, Chinese thought was never faced with the contradictions that drove the Greeks on to postulate a Real world existing beyond or behind the Sensed world. (See Physical Theory of Democritus below)

Being a one and being divided it must be capable of being divided infinitely. But Zeno's paradox shows this to be impossible since if points have extension an infinite number could not be contained in a finite line, and if they do not have extension an infinite number would never compose a line at all.

Therefore, because of this contradiction the Real as a Material, Sensed One, Infinitely Divided was given up and it was said that the Real was a Material, Sensed Many. Thus they had indivisibles with magnitude. But the discovery of incommensurable magnitudes, i.e. that the hypotenuses of certain right triangles could not be composed of a whole number, contradicted the theory that the Real is a Sensed Material Many.

To avoid this contradiction Democritus distinguished between the Real world and the Sensed world, putting the incommensurability in the Sensed world. The postulation of a Real world beyond the Sensed world is an important feature of modern Western science.

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## (B) Developed Scientific Thought:

## GREEK FOUNDATIONS OF WESTERN CIVILIZATION

Physical Theory  
(Democritus)Mathematical Theory  
(Plato)

Sensed Phenomena Not real. Merely the appearance of certain accidental combinations of real, ultimate, timeless, material atoms in the Real world.

Order All order is accidental, resulting from the way in which atomic particles happen to fall together.

Ultimate Reality Small bits of matter that have motion in the Real world that have Being--are timeless. These compose everything else by falling together in certain ways.

Not real. The appearance resulting from raw matter being formed in necessary ways by certain ultimate ratios which are in the Real world.

Order is necessary, ultimate and timeless. Even the smallest substances, the 3-dimensional atomic particles, are composed of 2-dimensional mathematical and these in turn are formed by certain ultimate ratios. Thus order is within the atoms and is necessary in forming them rather than being the result of the accidental falling together of atoms. Order comes into the Sensed world from the Real world.

Ratio (Logos). All forms of all things spring from certain ultimate ratios which have Being and are in the Real world.

Scientific Method Postulation of ultimate Real particles in a Real world to avoid the difficulty of incommensurable magnitudes and to explain all animation, order, and all sensed phenomena--all reality--in terms of the motion and combination of these atomic particles. (With logical deduction from the postulates and confirmation by checking against observed facts in the Sensed world.)

Postulation of mathematical and of ultimate ratios to solve the problem caused by incommensurable magnitudes, and to explain all animation, order and sensed phenomena in terms of ratio (Logos) & posing itself upon raw matter and forming and ordering and animating everything--all reality. (With logical deduction from the postulates and confirmation by checking against observed facts in the Sensed world.)

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Scientific Theory Underlying  
Confucian Ethics

Functional Theory  
(Aristotle)

True Functional Theory

Real, but not timeless. A stage in the movement toward the final form of each phenomenon--its final cause.

Not timeless. May or may not be real, depending on whether proper order prevails among all phenomena.

Order is not contained in the Sensed world, but it arises out of the Sensed world by logical abstraction. It is composed of the potential forms, the final causes of the sensed phenomena. Order is necessary, ultimate and timeless.

Order is not necessary to life, but it is necessary to civilization. Order is within the world of immediate apprehension, is ultimate and timeless.

Form. The forms of all things are in the Sensed world logically but not actually, i.e., they are present potentially and are the final causes that sensed phenomena are in the process of Becoming.

A Sensed Oneness, or unity, which includes the ordered totality of immediately observed phenomena. There is no entity smaller than the whole universe which is a Sensed One and Undivided. (This is possible because the animation and order was not given an anthropomorphic interpretation in China. Therefore, the chain of reasoning did not lead on to the discovery of incommensurable magnitudes and the postulation of a Real world beyond the Sensed world--so important to Western science.)

Observation, description and classification of sensed phenomena according to what characteristics the phenomena possess (defining by genera, species, and difference) and what they will become. (Postulation is involved in the theory of final causes.)

Observation, description and classification of sensed phenomena in terms not of what they are or of what they will become, but in terms of what they do. (A tree stands upright and gives shade. If it does not stand upright and give shade it is not a tree. A son is not a son unless he acts toward his father as a son should act, etc.) Observation, description, and classification not of characteristics of sensed phenomena, but of sensed phenomena as characteristics of the only entity--the sensed oneness of the undivided universe. Man counts as one sensed phenomena the same as a mountain, a river, a fish, or a bird, except that he is able to know the true order of all things and when he knows it to help to realize it by making it evident to other creatures.

Functional Theory (Cont'd)  
(Aristotle)

Categories are of sensed attributes--all creatures that have backbones, lungs, a warm blood system, etc. Definition is in terms of genera, species, and difference.

True Functional Theory (Cont'd)  
(China)

Categories are time and space--the sensed phenomena that occur at the same time and their geometrical distribution. This is a sensed space-time continuum, but it is public, because space and time are composed not of any sensed phenomena but only of properly ordered sensed phenomena.

Therefore, they are renewed by events that produce the experience of sensed oneness with the universe and become weak and diluted as memory of these experiences fade. Time is circular, not linear. Definition is by location in the space-time continuum. Because of the unique nature of space-time, definition is normative because it states the occasion when and the site where the sensed phenomenon should occur. The Tao of anything is given by its definition. Categories were the Four Orbits, the Five Elements, the Eight Trigrams, the Nine Provinces, the Ten Roots and the Twelve Branches, etc. Chou, or numerical categories, were especially useful because through the science of numbers--the manipulation of the numerical categories--all the possible relationships of sensed phenomena could be anticipated. This made possible a real science in that these relationships could be subjected to experiment. The ones that promoted the experience of sensed oneness would be verified and kept and the ones that did not would be rejected. In this way Tao, the proper order of all things, was scientifically determined. Therefore, the traditional emphasis on scholars was natural in China. Through the aid of the scholars the Emperor learned to know Tao and, through exemplifying it in his actions, he made it evident to all men. Since the animating and ordering force was active, men and things could not help but conform to Tao when it was made evident to them.

To understand the nature of man and the universe in which he lives in order to act effectively to survive and to satisfy men's needs and aspirations to the greatest possible extent. Because of inadequacy of the Platonic theory to account for all the facts (method of exhaustion necessary to certain mathematical propositions), the basic understanding, with this theory, involves knowledge of the observation, description and classification of the characteristics of sensed phenomena in the Sensed world, plus postulation of the potentiality of each phenomenon, its final cause, that it is in the process of Becoming. This knowledge is used to move gradually toward a perfect order in the universe that will perhaps never be fully attained but toward which man must strive.

To understand the nature of man and the universe in which he lives in order to act effectively to survive and to satisfy men's needs and aspirations to the greatest possible extent. Because of previous observations and the conclusions from them--that have not been contradicted by any observed fact--this basic understanding involves a knowledge of the Tao, or way, of all sensed phenomena, which when fully realized will constitute a perfect order in the Sensed world that can be fully attained. This knowledge is used in Confucianism to enable all men (all men living together in this view of reality, all men in t'ien hsia) to experience together the sensed oneness of the universe.

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Physical Theory (Cont'd)  
(Democritus)

Mathematical Theory (Cont)  
(Plato)

Cate-  
gories  
Used

This view was not fully de-  
veloped until Newton again  
assumed material atoms. In  
his classical mechanics the  
categories are position in  
terms of real, physical,  
public space, and velocity  
in terms of real, mathemati-  
cal, public, linear time.  
Definition is in terms of  
position and momentum.

Categories are of sensed phenomena,  
combinations of sensed stuff and pure  
form which are mathematical, and  
pure ideas (pure form, ratio).

Goal  
of the  
System  
of  
Thought

To understand the nature of  
man and the universe in which  
he lives, in order to act  
effectively to survive and to  
satisfy men's needs and  
aspirations to the greatest  
possible extent. Previous the-  
ories have been unable to ex-  
plain all the observed facts.  
Therefore, with this theory  
the basic understanding in-  
volves knowledge of the nature  
and behavior of minute  
particles of unseen matter in  
a Real world which is postu-  
lated to exist beyond or be-  
hind the Sensed world.

To understand the nature of man and the  
universe in which he lives, in order to  
survive and to satisfy men's needs and  
aspirations to the greatest possible ex-  
tent. Because of the contradictions in or  
inadequacy of previous theories to explain  
all the observed facts (e.g. order in  
nature), the basic understanding, with  
this theory, involves knowledge of atomic  
3-dimensional material substances but  
also of 2-dimensional mathematical, and  
further, of certain ultimate ratios, all  
in a Real world beyond or behind the  
Sensed world--and therefore involves  
knowledge of the Logos, the rational  
order prevailing in all creatures and  
things. This knowledge is used to con-  
trol and change sensed phenomena to con-  
form to the ideal given rationally.

COMMENT: It will be seen that the traditional Chinese view of reality is  
essentially strange to a conception of man as a separate entity, worthy of ex-  
amination in and for himself, and possessing certain unique characteristics,  
and therefore entitled to an area of freedom of action not to be invaded by  
any government. The Chinese view of reality does not allow a pursuit of power  
by altering the structure of sensed phenomena (manipulating atoms and mole-  
cules) and there is, therefore, no question of making a just distribution of  
power. (See my Introductory Lecture) There is no support, therefore, in the  
traditional Confucian view of reality for political institutions of consti-  
tutional government and individual freedom such as China has attempted to  
borrow from Western civilization.

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